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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 952

SAMUEL SKLAROFF AND ANNA SKLAROFF, *Petitioners,*

v.

JAMES SKEADAS AND CATHERINE SKEADAS, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island is not reported, but may be found in Appendix A to the Petition (A1-A6). Opinions of the Supreme Court of Rhode Island, filed February 14, 1956 and March 2, 1956, in related adoption proceedings are reported at 120 A.2d 694, et seq., and may be found in Appendix D(1), (2), (3) of Petition A9-A19.[1]

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[1] Hereinafter designated as Pet. The Petition for Writ of Habeas Corpus filed in the court below is hereinafter designated as Pet. H. C. Certified portions of transcript in the related adoption case are filed with the Clerk of this court and hereinafter designated as Tr.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered May 2, 1956 (Pet., A8). Application for stay of execution (see Record filed by Petitioners) was denied with opinion by the court below on May 2, 1956 (Pet., A7). Under order of Mr. Justice Frankfurter granting limitedly petitioners' application for stay to this Court, petition for a writ of certiorari was filed May 17, 1956. Mr. Justice Frankfurter filed a written opinion in which he stated in part:

> "The time for determining the very narrow issues which I have formulated, namely, whether a petition for certiorari in this case would commend itself to at least four members of this Court, should be as short as possible. It certainly should not extend beyond this Term of Court. I shall therefore grant a stay, for a period which will expire fourteen days from the filing of this memorandum in the Clerk's Office, unless by that time the petitioners will have filed with the Clerk of this Court a petition for certiorari. In that event the stay will continue until the disposition of such petition by the Court. (Such a petition may, if convenient, be in typewritten form.) Upon the filing of such a petition it will be for the respondents, if they so choose and for which they will have had ample time, to file a response in time sufficient for the petition to be disposed of before the usual adjournment of this Court in June."

The jurisdiction of this Court has been invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners have standing to assert a claimed constitutional right of the infant, James Michael Skeadas.

2. Whether the petition for writ of certiorari presents any federal question, let alone a substantial federal question.

3. Whether the infant was deprived of liberty without due process of law by the decree of the court below requiring petitioners, neither of whom is related to him by blood or affinity nor entitled to custody by judicial decree, to return him to the custody of his natural parents who, as the state court determined, are fit and able to perform their parental obligations.

With reference to the questions presented, it is important to note that in the court below petitioners asserted in Par. 20 of the Return, five purported federal questions which were deemed of no merit (Pet. A4-6). These same five questions were raised in the Application for Stay in the court below and the court below by its opinion and order denied the stay (Pet. A7). In the Application for Stay addressed to Mr. Justice Frankfurter, the same five questions were relied upon and Mr. Justice Frankfurter set them out verbatim in his opinion.

However, in the petition for writ of certiorari, in the process of distilling the same five questions into two questions, (Pet., p. 3) petitioners have raised in veiled form an additional purported federal question *for the first time,* namely, that petitioners were denied an opportunity to present evidence in open court to establish "that the parents are unfit to assume the duties and privileges of parenthood" (Pet., p. 14). Apart from the merits, this alleged infringement of procedural due process under the 14th Amendment was not presented to or passed upon by the court below.

The court below heard oral argument on the petition and return on April 25, 1956 (Docket Entry, Record) and no federal question was asserted when the court below announced that oral testimony would not be taken, the court having studied the petition and return following the filing of the return on April 23, 1956 (Pet., A1); no proffer of specific proof was made as required by state law, apart from the failure to raise a federal question; briefs were ordered to be filed by May 2, 1956, and no federal question was raised therein as to an alleged federal right to present oral testimony when filed on April 30, 1956 (Docket Entry, Record); on May 2, 1956, when the opinion and judgment were entered and when the motion for stay was presented in writing and orally, no federal question as to the alleged right to present oral evidence was raised (Docket Entries, Record and opinion below denying stay, Pet. A7). And, as suggested, the matter was not contained in the application for stay addressed to Mr. Justice Frankfurter. The "question" was not presented in or passed upon in the court below and this is fatal, particularly where "questions of pleading, evidence and the like" are involved. *Whitney* v. *California,* 274 U.S. 357, 362, 363 (1927).

The court below reviewed the pertinent facts alleged in the petition and return in the light of its knowledge of the facts in *Sklaroff* v. *Stevens,* 120 A.2d 694 and observed that reliance was being had by petitioners on alleged moral lapses of "four or five years ago and before their lawful marriage." (Petition, A2) Furthermore, the court pointed out that "the respondents in their return significantly allege no fact to show that since the marriage of petitioners in 1953 either of them has been guilty of any immoral or questionable conduct; or that they have failed to maintain a clean, com-

fortable, and proper home; or that they have not been kind and faithful parents bringing up their children properly in accordance with correct legal and moral standards; or that there is any existing fact by which petitioners are shown to be *presently* unfit and unable to discharge their parental obligations to this child according to law" (Pet., A4).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The provisions of the Constitution involved are set forth in the Petition at page 3.

2. (a) Massachusetts Statute governing placement of children: Annotated Laws of Mass., Chapter 119, sections 6, 8 (see Appendix B(a)).

(b) Massachusetts Legitimization Statutes: Annotated Laws of Mass., Chapter 190, sec. 7; Chapter 46, sec. 13, 2d para. (see Appendix B(b)).

(c) Rhode Island Legitimization Statute: General Laws, 1938, Chapter 424, sec. 13, (See Appendix B (c)).

(d) Rhode Island Adoption Statute: General Law, 1938, Chapter 422, Sec. 2, (See Appendix B (d)).

STATEMENT

The controversy here derives from resort by petitioners to illegal channels in the acquisition of the then illegitimate infant child of the respondents.

In August 1951 the petitioners herein gave a sum of money in cash to a Boston attorney for the purchase of the infant (Tr. 115, 428, 514). Their contacts with him were at his home in Mattapan, Massachusetts (Tr. 70, 106-107). Although the Boston lawyer had never seen the natural parents or represented them in any

capacity, he acted in concert with a Lynn, Massachusetts lawyer to whom some of the cash was given (Tr. 79-91, 104-116, 250). The money was paid to the Boston lawyer on or about August 26, 1951 (Tr. 514-515). Telephone calls to the petitioners on September 23 and September 25, 1951, directed them to Lynn, Massachusetts, where they made their first contact with the Lynn lawyer on the latter date (Tr. 515). He did not know their names or identity until then. (Tr. 516). They were directed to a place near his office to await physical delivery of the child yet with his natural mother in a Lynn hospital (Tr. 516-524).

Discharged from the hospital at about 5:30 P.M., the mother, in company with the natural father, who acted on directions, was driven to a point near the law office where they were ordered to follow the lawyer's car to another street (Tr. 573-574, 648-654). Here, under tearful protest of the emotionally disturbed and physically weakened mother, the baby was taken by the lawyer's secretary, in his presence, and transferred to his car (Tr. 247, 574, 648-654). The infant was then driven back to an area near the law office where he was removed by the woman secretary (Tr. 524). She then walked to the place where petitioners were waiting in their auto (Tr. 524-525). Petitioners did not know the identity of the woman secretary carrying the child. The infant was handed over to the petitioners by this unknown woman (Tr. 500-501). At dusk (Tr. 523) petitioners immediately transported the infant across the state line to their residence in Providence, Rhode Island, some sixty miles away (Tr. 526-527).

The Lynn lawyer had obtained the signature of the natural mother consenting to adoption while she was

recovering from childbirth in the Lynn hospital (Tr. 553, 564-567). He obtained the signature on a blank form printed for official use in the Juvenile Court of Rhode Island (Tr. 567). This form was completed under date of April 7, 1952, and filed by the petitioners in the Juvenile Court of Rhode Island on April 8, 1952. It was only then, through social welfare investigation, that the natural parents learned of the whereabouts of the infant (Tr. 586). Prior thereto the mother had made consistent efforts to obtain the child's return through the Lynn attorney, who purported to have the power so to do, but who was demanding varying amounts of money which he well knew could not be met (Tr. 657-660). "The mother of the child almost from the date she left the hospital after his birth has been fighting persistently and legally to obtain his return" (Pet., A4). "These efforts proved unsuccessful because certain substantial financial demands which apparently they could not meet were insisted upon as necessary to obtain the return of the child" (120 A.2d 694, 696; A10).

Upon the objection of the natural mother, the Juvenile Court took testimony which warranted the factual finding that there was "want of voluntary consent of the mother" (Pet. A18; 120 A.2d 694, 698).

Petitioners appealed to the Superior Court (Pet., p. 5). At the time of the birth of the infant and continuing until late April 1953, a valid legal impediment prevented the lawful marriage of the natural parents. This for the reason that under Massachusetts law the divorce decree of the natural mother did not become final until April 26, 1953. However, four days after the finality of the divorce decree, the natural parents were married at Lynn, Massachusetts, on

May 1, 1953 (Pet. H. C., Par. 7). Under Massachusetts law an illegitimate child is legitimatized by the marriage of his parents (Appendix B, (b) this Brief). Three days thereafter they went to the city clerk in Lynn and complied with the provisions of law affecting the change of name of the infant (Appendix B(b), this Brief; Pet. H. C., par. 8; Pet. A11). Efforts of the natural parents to obtain custody of the infant *pendente lite* or for right of visitation were effectively resisted (Ret. to W., par. 9). Respondents appeared in the Superior Court and objected to the adoption of their child (Pet. A11; 120 A.2d 694, 696, 699). Written consent of the natural father was never obtained (Pet. A16, A18; 120 A.2d 694, 698, 699).

Judgment was entered for petitioners and appeal was taken to the Supreme Court of Rhode Island on bill of exceptions to numerous rulings and denials of the trial court (Pet. H. C., par. 10).

On February 14, 1956, the Supreme Court of Rhode Island set aside the order of the Superior Court on the ground that the Superior Court had no jurisdiction because the statute governing adoptions required the voluntary consent in writing of both parents. The Court below charitably confined its discussion to "only the controlling facts concerning the motion to dismiss" (120 A.2d 694, 695; Pet., A9-10), stating:

> "We therefore intentionally omit, as far as possible, reference to all the remaining and extensive evidence, particularly that of two intermediaries residing in Massachusetts whose testimony is not free from suspicion, coercive inducement or other questionable conduct."

It was not until after this final judgment that a federal question was first suggested by petitioners on

application for stay (Pet. A17; 120 A.2d 694, 699). The unique constitutional right then asserted was a "claim of petitioners to a vested right in the child" (Pet. A17, 18; 120 A.2d 694, 699). This was denied (Pet. A17-19; 120 A.2d 694, 698-699). In accordance with the order of the Court below, decree dismissing for want of jurisdiction was entered in the Superior Court on March 21, 1956 (Pet. H. C., par 15). On April 3, 1956, decree was entered in the Juvenile Court denying and dismissing petition for adoption (Pet. H. C., par. 16). Certiorari was not sought.

Refusal of the petitioners to respond to request for the return of the infant forced the natural parents to seek his lawful surrender by petition for writ of habeas corpus filed in the Supreme Court of Rhode Island April 13, 1956. Instead of giving the opinion and judgment in the adoption case binding effect as to the law therein declared, a "lengthy and argumentative" Return was filed which renewed "in substance and effect the claims relied on to support their petition for adoption of this child, which petition was denied and dismissed in *Sklaroff* v. *Stevens,* R.I. 120 A.2d 694" and which contained

> "allegations of facts and law which are contrary to that decision; other allegations based upon a misconception of the Massachusetts statute under which petitioners legitimatized this child; and certain other assumptions, conclusions and argumentative assertions in an effort to support a unique claim that the child by his legitimization was deprived of rights under the due process clause of the 14th Amendment to the United States Constitution, and that the full faith and credit clause thereof was violated."

The return also asserted "certain alleged moral lapses by the petitioners which happened four or five years ago and before their lawful marriage" (Pet. A1-2). This return is the principal part of the record relied upon by petitioners.

After consideration of pleadings and briefs and oral argument, the court granted the petition on May 2, 1956, with an opinion which pointed out, among other things, that

> "the respondents in their return significantly allege no fact tending to show that since the marriage of petitioners in 1953 either of them has been guilty of any immoral or questionable conduct; or that they have failed to maintain a clean, comfortable and proper home; or that they have not been kind and faithful parents bringing up their children properly in accordance with correct legal and moral standards; or that there is any existing fact by which petitioners are shown to be *presently* unfit and unable to discharge their parental obligations to this child according to law." (Pet. A1-4).

The court further noted that no question of abandonment was involved:

> "The mother of the child almost from the date she left the hospital after his birth has been fighting persistently and legally to obtain his return. She has made reparation for her past misdeeds as far as it is humanly and legally reasonable to do so. Any present attachment of respondents is not chargeable to petitioners' abandonment or delay." (Pet. A1, A4)

In summary, petitioners acquired possession of the infant in violation of the Massachusetts Child Placement statute and without notice to the authorities

(Appendix B (a), this Brief). The consent of the mother was judicially found to have been obtained under circumstances negating her voluntary consent (Pet. A18; 120 A.2d 694, 699). It is conceded that the written consent of the father was never obtained (Appendix B (d), this Brief). The short of it is that petitioners resorted to illegal interstate channels to acquire the infant, a practice which has created such grave problems as to lead to inquiry by the Congress and compel the introduction of federal legislation (see Appendix A, this Brief).

ARGUMENT

1. Petitioners have no standing. There is no constitutional, statutory or common-law right of the petitioners affected by said judgment. Nor do petitioners seek protection of any such rights. Under state law the petitioners stand as strangers to the child. ". . . the [petitioners] are not related to him by blood or affinity. Nor do they have a decree or judgment of any court of competent jurisdiction which would clothe them with a present legal right to his custody" (Pet. A2).

One has no standing to assert the constitutional rights of another. "The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is entitled to sue for the benefit of another, he is bound to show an interest in the suit personal to himself . . ." *Tyler* v. *Judges of The Court of Registration,* 179 U.S. 405 (1900); *Brown* v. *Smart,* 145 U.S. 454 (1892); *New York ex rel. Hatch* v. *Reardon,* 204 U.S. 152 (1907);

The Winnebago, 205 U.S. 354 (1907); *Tileston* v. *Ullman*, 318 U.S. 44 (1943); and see concurring opinion of Justice Frankfurter, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 153-154 (1951).

Apparent exceptions to this rule, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1924); *Truax* v. *Raich*, 239 U.S. 33 (1915); *Barrows* v. *Jackson*, 346 U.S. 249 (1953), are not applicable here. The party allowed to assert the constitutional rights of others has been permitted to do so only in those instances where necessary to protect some substantial legal interest of his own. In *Barrows* v. *Jackson* respondent was allowed to assert that the rights of non-Caucasians were violated. "There is such a close relationship between the restrictive covenant here and the sanction of the state which would punish respondent for not going forward with her covenant, that relaxation of the rule is called for here. It sufficiently appears that mulcting in damages of respondent will be solely for the purpose of giving vitality to the restrictive covenant, that is to say, to punish respondent for not continuing to discriminate against non-Caucasians in the use of her property." 346 U.S. at 258. Petitioners are not similarly situated. They have no substantial legal interest adversely affected by any alleged infringement of the child's rights.

Standing here should be governed by *Tileston* v. *Ullman, supra*, holding that a physician had no standing to litigate the constitutional validity of a statute prohibiting the use of drugs or instruments to prevent conception and the giving of assistance or counsel in their use where the complaint set out in detail the danger to the lives of his patients in the

event they should bear children but contained no allegation asserting any claim under the 14th Amendment of infringement of the physician's rights to liberty or property. The physician achieved no standing in *Tileston* merely because the statute applied directly to him. The fact that the mandate of the court below ran directly against the petitioners here is immaterial.

Petitioners lack of standing is self-evident when the nature of habeas corpus in a custody case is understood. If respondents had not prevailed below, it does not follow that petitioners would receive custody of the infant. The state court had power to award custody in the best interests of the child, not necessarily to one of the competing parties.

2. The decree awarding custody of the infant to his natural parents, after having determined that they had not abandoned him and that they were presently fit and able, raises no federal question and is not subject to review by this Court. (28 U.S.C.A., 2101(f)).

The Supreme Court of Rhode Island determined that under its law natural parents have a presumptive right to the custody of their children which can be overcome only by allegations and proof of present unfitness of natural parents or of abandonment of the child by natural parents. There was no allegation by petitioners in their Return of any fact which showed respondents were *presently* unfit to discharge their parental obligations (Pet. A4). In the absence of any assertion of present unfitness, the court below determined that the burden of overcoming the presumptive right of the natural parents had not been met and that custody should be awarded to the natural parents.

Further, in an earlier opinion denying adoption to petitioners, the court below stated: "There is also independent evidence to the effect that James and Catherine Skeadas have another child, Dennis George Skeadas, and that they maintain a clean and comfortable home in a good neighborhood." (Pet. A11)

Thus, it is clear that the case, as petitioners would have this court believe, was not one of admittedly unfit parents vying with admittedly fit challengers for the custody of the child, but on the contrary was the case of natural parents, whose present fitness had not been disputed, seeking to regain a child from strangers who had procured the child as a result of interstate negotiations among attorneys. Respondents pretermit the sordid manner in which the child was initially obtained by petitioners. The court below stated:

> "We therefore intentionally omit, as far as possible, reference to all of the remaining and extensive evidence, particularly that of two intermediaries residing in Massachusetts whose testimony is not free from suspicion, coercive inducement, or other questionable conduct. * * * It is unnecessary to relate how this attorney came to contact Catherine and what he did in conjunction with another attorney of Boston, Massachusetts, in placing the child with the Sklaroffs." (Pet. A10)

Petitioners' suggestion that the Rhode Island law of domestic relations has been changed by the instant case by the subordination of the welfare of the child to "merely biological claims to custody" (Pet., p. 14) ignores completely the universally accepted principle that the best interests of the child are presumed to be served by awarding custody to the natural parents. Cf. *People ex rel. Kropp* v. *Shepsky*, 305 N.Y. 465, 113

N.E. 2d 801 (1953); *Judd* v. *Van Horn*, 195 Va. 988, 81 S.E. 2d 432 (1954); *State ex rel. Fossen* v. *Hitman*, 154 Minn. 373, 205 N.W. 267 (1925).

In recognizing the presumptive right of the parents and in awarding custody to respondents in the absence of a showing of abandonment and unfitness, the court below applied principles of law accepted universally by the states. *People ex rel. Kropp* v. *Shepsky, supra; State ex rel. Fossen* v. *Hitman, supra; Judd* v. *Van Horn, supra; Stout* v. *Stout*, 166 Kan. 459, 201 P. 2d 637 (1949); *Blow* v. *Lottman*, —— S.D. ——, 59 N.W. 2d 825 (1953); *Stinson* v. *Meegan*, 318 Mass. 459, 62 N.E. 2d 113 (1945); *Lung* v. *Frandsen*, 155 Neb. 255, 51 N.W. 2d 623 (1952); *Parks* v. *Crowley*, 221 Ark. 340, 253 S.W. 2d 561 (1953); *State ex rel. Martin* v. *Garza*, 217 La. 532, 46 So. 2d 760 (1950); *Rodale* v. *Grimes*, 211 Ga. 674, 87 S.E. 2d 857 (1955); *Griggs* v. *Barnes*, 257 Ala. 21, 57 So. 2d 61 (1952); *Commonwealth ex rel. Harry* v. *Eastridge*, 374 Pa. 172, 97 A.2d 350 (1953); *Harper* v. *Tipple*, 21 Ariz. 41, 184 Pac. 1005 (1919); *Hardcastle* v. *Hardcastle*, 118 Utah 192, 221 P. 2d 883 (1950); *Ex parte Ward*, 39 Wash. 2d 894, 239 P. 2d 560 (1952); *Marcum* v. *Marcum*, 265 P. 2d 723 (Okla., 1954); *Stewart* v. *Stewart*, 41 Cal. 2d 447, 260 P. 2d 44 (1953); *Wright* v. *People*, —— Colo. ——, 279 P. 2d 676 (1955); *Horn* v. *Horn*, 5 Ill. App. 2d 346, 125 N.E. 2d 539 (1955); *Lavigne* v. *Family and Children's Society of Elizabeth*, 18 N.J. Super. 559, 87 A. 2d 739 (1952); *Starnes* v. *Jost*, 228 S.W. 2d 563 (Tex. C.A. 1950); *Reynolds* v. *Davidow*, 200 Miss. 480, 27 So. 2d 691 (1946).

Petitioners recognize that Rhode Island can without constitutional impediment determine, after hearing evidence, that the non-parents have not sustained the

burden resting on them to establish that the natural parents have abandoned their rights or that the natural parents are unfit to assume the duties and privileges of parenthood (Pet., p. 14). In the instant case Rhode Island treated all *pertinent* facts alleged in the Return as established (Pet. A2). No useful purpose would have been served by the submission of evidence as to facts which the court assumed to be established. No allegations were made, or proffer of specific proof tendered, of present unfitness. Hence, the instant case is no different from that which petitioners concede to be free from constitutional infirmities.

It is not strange, therefore, that petitioners' contention that the judgment below violates the infant's constitutional rights is both unique and unsupportable. Repeated decisions of this Court have asserted that "the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Ex parte Burrus,* 136 U.S. 586, 593, 594 (1890); *Simms* v. *Simms,* 175 U.S. 162, 167 (1899); *State of Ohio ex rel. Popovici* v. *Agler,* 280 U.S. 379, 383 (1930); *Williams* v. *North Carolina,* 325 U.S. 226, 233 (1945); *Cf. Matters* v. *Ryan,* 249 U.S. 375, 377 (1919).

3. Petitioners seek to avoid the logical effect of these cases, *supra,* by claiming (1) that the action of Rhode Island in returning the child to his natural parents whose present fitness has not been attacked is a "monstrous cruelty" and hence deprives him of liberty without due process of law under the principles enunciated in *Rochin* v. *California,* 342 U.S. 165 (1951); and, (2), that the action of Rhode Island in recognizing that the child born illegitimate was

legitimatized by the subsequent marriage of his parents in Massachusetts also violates the due process clause.

Petitioners' contention that the action of the Rhode Island Supreme Court in returning the child to respondents constitutes a "monstrous cruelty" depriving him of liberty without due process of law may be simply answered by the fact that the return to the custody of his natural parents will not result in a "monstrous cruelty." In the case at bar the natural mother has been fighting persistently and legally to obtain the child's return almost from the date she left the hospital in September, 1951 (Pet. A4). Furthermore, as the court below stated:

> "In the instant case the respondents in their return significantly allege no fact tending to show that since the marriage of petitioners in 1953 either of them has been guilty of any immoral or questionable conduct; or that they have failed to maintain a clean, comfortable and proper home; or that they have not been kind and faithful parents bringing up their children properly in accordance with correct legal and moral standards, or that there is any existing fact by which petitioners are shown to be *presently* unfit and unable to discharge their parental obligations to this child according to law." (Pet. A4)

Under these circumstances to allege that any cruelty would result from awarding custody to respondents would be nothing more than sheer conjecture and is only a gratuitously asserted psychological prognostication. Courts have recognized that a child of tender years is able to adapt himself readily to a change in environment particularly when he is entrusted to the care of his natural parents. *Harvey Adoption Case,*

375 Pa. 1, 99 A. 2d 276 (1953); *Andrews Adoption*, 14 Pa. Dist & Co. 343.

In the second place, a child would not be deprived of liberty without due process of law if a state court erred when it determined the child's proper custodian. *Rochin* holds that brutal or shocking force asserted on the person to acquire evidence renders void a conviction based upon the use of that evidence. *Cf. People* v. *Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8 (1953); *City of Barron* v. *Covey*, 271 Wisc. 10, 72 N.W. 2d 387 (1955); *Breithaupt* v. *Abram*, 58 N.M. 385, 271 P. 2d 827 (1954).

Coercion, violence and brutality were the bases for the *Rochin* decision. *Irvine* v. *California*, 347 U.S. 128, 133 (1954). These elements are totally lacking here. Certainly the action of Rhode Island in awarding custody of the infant to his natural parents cannot be compared with the action of the federal government in depriving negro children of the opportunity of securing a public education under the same conditions as white children. *Cf. Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Petitioners, under the mask of the *Rochin* case, seek to have this Court adopt a certiorari policy which would inevitably require a finding of a violation of the 14th Amendment whenever this Court disagrees with a decision of the highest court of a state. Such a policy would produce havoc in the area where the state court sits as *parens patriae*. This court has consistently refused to adopt an absolutistic position as final arbiter as a matter of course of state law, *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Schwartz* v. *The State of Texas*, 344 U.S. 199 (1952).

Petitioners also contend that the infant is deprived of liberty without due process of law by the recognition

by Rhode Island of the legitimization of the infant born in Massachusetts of natural parents domiciled in Massachusetts who entered into a marriage in Massachusetts while still domiciled in that state. Petitioners contend that since the child was physically present in Rhode Island his constitutional rights were infringed by giving effect to the Massachusetts statute which legitimates a child upon the marriage of his parents. This contention assumes that there is no connection whatsoever between Massachusetts law and the status of the infant. It can be speedily answered. In the first place, it may well be argued that here national policy requires Rhode Island to give full faith and credit to the Massachusetts statute when that statute is not penal, is not contrary to the public policy of Rhode Island, and does not require a procedure for its enforcement for which the courts of Rhode Island are unsuited. *Hughes* v. *Fetter,* 341 U.S. 609 (1951); *Broderick* v. *Rosner,* 294 U.S. 629 (1935); *Cf. Carroll* v. *Lanza,* 349 U.S. 408 (1955).

The failure to give full faith and credit might result in a child being legitimate in one state and illegitimate in another, an undesirable result when, as petitioners point out, "When family life is fluid and interstate migration is the rule rather than the exception." (Pet., p. 20).

Olmsted v. *Olmsted,* 216 U.S. 386 (1910), is not inconsistent with this view. All that this Court stated in the *Olmsted* case was that New York was not required to give effect to a Michigan statute legitimatizing those born with the bar sinister upon the marriage of their parents when to do so would divest the title to real property situated in New York from third parties contrary to the public policy of New York.

The instant case neither involves the divestment of vested rights nor the application of law contrary to the policy of the forum. The policy of Rhode Island is squarely in accord with that of Massachusetts, each state having statutes providing that illegitimate children shall become legitimatized by the subsequent marriage of their parents (Appendix B (b) and (c) this Brief).

Secondly, if Rhode Island were not required to give full faith and credit to the Massachusetts statute, nothing in the 14th Amendment precludes Rhode Island from giving effect to it by comity. *Bank of Augusta* v. *Earle*, 13 Pet. 519 (1839); *Milwaukee County* v. *White Co.*, 296 U.S. 268 (1935). This is not a case where the law of a state is applied to a subject to which it has no reasonable relationship, e.g., *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1 (1910). Here the child was born in Massachusetts, the marriage took place in Massachusetts, and significantly, the parents of the child were at all times domiciled in Massachusetts. It has been consistently held that the question of whether a child is legitimatized by the subsequent marriage of his parents is determined by the law of the domicile of those parents. *De Wolfe* v. *Middleton*, 18 R.I. 810, 26 A. 44, 31 A. 271 (1893); *Blythe* v. *Ayres*, 96 Cal. 532, 31 P. 915 (1892); *Ives* v. *McNicoll*, 59 Ohio St. 402, 53 N.E. 60 (1899); *Caballero* v. *Executor*, 24 La. Ann. 573 (1872); *Adams* v. *Adams*, 154 Mass. 290, 28 N.E. 260 (1891); *Fowler* v. *Fowler*, 131 N.C. 169, 42 S.E. 563 (1902); *Re Wray's Estate*, 93 Mont. 525, 19 P. 2d 1051 (1933); *Peirce* v. *Peirce*, 379 Ill. 185, 39 N.E. 2d 990 (1942); *Smith* v. *Kelly*, 23 Miss. 167, 55 Am. Dec. 87 (1851); *Thorn Estate*, 353 Pa. 608,

46 A. 2d 258 (1946); *Smith* v. *Mitchell*, 185 Tenn. 37, 202 S.W. 2d 979 (1947).

In utilizing the law of the domicile of the parents to determine the issue of legitimacy, state courts have done nothing more than follow this Court's decision holding that the status of a minor is ordinarily determined by the law of the father's domicile, not the place of the child's residence. *Yarborough* v. *Yarborough*, 290 U.S. 202, 211 (1933). Presumably petitioners contend that the application of this settled law would be unconstitutional for the reason that the infant was physically located in Rhode Island. No such exception is recognized in the cases. If, however, the place of the child's residence is to be the basis for the choice of which law will govern legitimization petitioners stand in no better position. The law of Rhode Island is in accord with that of Massachusetts, and hence if the domestic law of Rhode Island is applied, the child is still legitimate (Pet. A12; Appendix B(c), this Brief).

Even if it be assumed that Rhode Island improperly treated the child as legitimate, petitioners cannot meet the claim of the natural mother to custody. If the natural mother had been the sole petitioner in the habeas corpus proceeding, she would have been entitled to custody, there being no showing of abandonment or present unfitness. Thus it is of no concern to petitioners that the court below vested custody in respondents.

Finally, assuming that Massachusetts law has been erroneously applied to legitimatize the infant, no deprivation of a right has occurred as a result of changing his status from that of an illegitimate to that of a legitimate child.

To hold that the petitioners are entitled to relief against the decree below would be tantamount to holding that, whenever adoption is denied, the disappointed parties could circumscribe traditional state power over children solely on a claim of harm to the child.

CONCLUSION

For the foregoing reasons, it is abundantly clear that the decision below is correct, and that no substantial federal question has been raised. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

The subject of baby brokerage, including state policy in the field as well as interstate aspects, is currently receiving the attention of Congress. Evidence developed before a special Subcommittee of the Judiciary Committee of the United States Senate has indicated a nation-wide pattern of commercial dealings in placement of children. See S. 2281, 84th Cong., 1st Sess.; S. 1123, 84th Cong., 1st Sess.; S. 3021, 84th Cong., 2d Sess. See Hearings Before Subcommittee to Investigate Juvenile Delinquency of the Committee of the Judiciary, U. S. Senate (pursuant to S. Res. 62, 84th Cong., 1st Sess.), July 15 and 16, 1955, entitled "Interstate Adoption Practices"; Nov. 14 and 15, 1955, entitled "Interstate Adoption Practices—Miami, Florida." Further hearings are being heard currently.

The typical case disclosed by these records involves a lawyer-broker, to whom cash is paid, overseeing transfer of a child without approval of state courts and agencies at a time of high emotion, impecuniousness and bewilderment on the part of the natural parents. Need for legislation, where interstate movement is involved, has been voiced by Congress, *Cong. Record*, Jan. 23, 1956, pp. 873-874. In addition to civil problems, family relations and inheritance, criminal dangers such as blackmail and resort to underworld techniques are attendant upon commerce in infants. To aid the states in solving this problem, S. 3021, 84th Cong., 2d Sess., has been introduced prohibiting transfer and placement of children across state lines *prior to* investigation and approval by the state in which the child will reside. The sponsor of the bill stated:

> ". . . The proposed legislation is not intended in any way to remove or interfere with the basic responsibility of the state in dealing with adoptive matters. . . . Rather, it is intended to combat those situations which are beyond the control of the states and to eliminate the tragic and sordid interstate traffic in children." Cong. Record, 84th Congress, 2d Sess., p. 873, Jan. 23, 1956.

APPENDIX B

(a) Massachusetts Statute governing Placement of Children: Annotated Laws of Mass., Ch. 119, Sec. 6:

"Whoever receives under his care or control, and whoever places under the care or control of another for compensation, an infant under fourteen years of age, not related by blood or marriage to the person receiving it, shall, within two days thereafter, give notice thereof, and of the terms upon which such infant was received, to the department [of public welfare], with the name, age, and residence of the infant, its parents, and the person from whom and by whom received; but if such an infant under two years of age was received from the board of public welfare of any town, or from the institutions department of Boston, or from any charitable corporation organized under the laws of the commonwealth, or from any municipal veterans' service department, such notice may state only the name and age of such infant and the name and location of the board, department or corporation from which received."

Chapter 119, Sec. 8:

"Whoever neglects to give the notice required by section six or refuses to give information upon request of the department, its officers or agents, or fails to comply with the orders of a court made in accordance with the preceding section [relating to judicial orders for custody] shall, upon complaint of the department be punished by a fine of not more than one hundred dollars or by imprisonment for not more than one year, or both."

(b) Massachusetts Legitimization Statutes: Annotated Laws of Mass., Chapter 190, Sec. 7:

"An illegitimate child whose parents have intermarried and whose father has acknowledged him as his child or has been adjudged his father under chapter two hundred and seventy-three shall be deemed legitimate and shall be entitled to take the name of his parents to the same extent as if born in lawful wedlock."

Chapter 46, Sec. 13, 2d para.:

"If a person shall have acquired the status of a legitimate child by the intermarriage of his parents and the acknowledgement of his father or an adjudication of paternity under chapter two hundred and seventy-three, as provided in section seven of chapter one hundred and ninety, the record of his birth shall be amended or supplemented as hereinafter provided so as to read, in all respects as if such person had been reported for record as born to such parents in lawful wedlock." (Remainder of Section 13 not reproduced.)

(c) Rhode Island Legitimization Statute: Chapter 424, Section 13, General Laws of Rhode Island, 1938, as amended by Public Laws, 1944, Chapter 1394:

"Illegitimate children shall become legitimatized by the subsequent marriage of their parents to each other and issue of marriages declared null in law shall nevertheless be legitimate, and in such case the city or town clerk having custody of the birth records at the request of either parent, or the child so legitimatized, shall make any changes necessary in order to remove from said records any evidence of illegitimacy."

(d) Rhode Island Adoption Statute: Chapter 422, Section 2, General Laws of Rhode Island, as amended by Public Laws, 1944, Chapter 1441, Sec. 36:

"The parents of the child, or the survivor of them, shall, except as herein provided, consent in writing to such adoption, or such petition shall be dismissed." (Remainder of section not reproduced.)